(1)

Court, U.S.
D

96 360 SEP 3 1996

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

HERBY BRANSCUM, JR., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DAN GUTHRIE
1845 Woodall Rodgers Freeway
Suite 1000
Dallas, TX 75201
(214) 953-1000

Attorney for Petitioners Herby Branscum, Jr. and Herby Branscum, Jr., P.A.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

QUESTIONS PRESENTED

1. Does the August 5, 1995 order entered by the Special Division of the Court of Appeals for the District of Columbia appointing Kenneth W. Starr as independent counsel violate the Appointments Clause and Article III of the Constitution by providing him with prosecutorial jurisdiction over allegations concerning any person whose name arises during his investigation even if that jurisdiction is not demonstrably related to the factual circumstances which gave rise to the appointment?

2. Are the decisions of the Attorney General to refer matters related to initial prosecutorial jurisdiction subject to judicial review where the initial prosecutorial jurisdiction is challenged as an unconstitutional and unlawful grant of power?

3. Are the recusal determination and preliminary investigation requirements of 28 U.S.C. § 591(c) mandatory prerequisites to a referral by the Attorney General to independent counsel of a non covered person under the provisions of 28 U.S.C. § 594(e)?

4. Does Kenneth W. Starr's failure to file the sworn affidavit imposed under 5 U.S.C. § 3332 within the required thirty days of his appointment cause his actions as independent counsel to be void because the filing of this affidavit was a condition precedent to him becoming empowered with the appointment?

5. Did the passage of Public Law 103-270 on June 20, 1994 validly renew the independent counsel statute where Congress did not reenact the entire law but merely changed the effective dates of a prior statute which had by its own sunset terms already expired?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eighth Circuit were Herby Branscum, Jr., Herby Branscum, Jr., P.A., Robert M. Hill, Robert M. Hill, P.A. and the Perry County Bank.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

CITATION TO OPINION BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THE COURT OF APPEALS DECISION UPHOLDING THE CONSTITUTIONALITY OF THE BROAD SCOPE OF PROSECUTORIAL JURISDICTION GIVEN INDEPENDENT COUNSEL IS IN DIRECT CONFLICT WITH *MORRISON V. OLSON* ... 6

II. THE CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE JUDICIAL REVIEW OF THE ATTORNEY GENERAL'S REFERRAL DECISIONS UNDER THE INDEPENDENT COUNSEL STATUTE 9

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE PREREQUISITES IMPOSED ON THE ATTORNEY GENERAL UNDER THE INDEPENDENT COUNSEL STATUTE PRIOR TO REFERRING A NON-COVERED PERSON TO INDEPENDENT COUNSEL 14

TABLE OF CONTENTS – Continued

Page

IV. THIS CASE PRESENTS AN IMPORTANT CASE OF FIRST IMPRESSION AS TO WHETHER THE STATUTORY REQUIREMENT THAT A SWORN AFFIDAVIT BE FILED STATING THAT THE APPOINTMENT HAS NOT BEEN PURCHASED IS A CONDITION PRECEDENT TO BECOMING EMPOWERED WITH THE POSITION..... 20

V. THIS CASE RAISES AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE VALIDITY OF THE CURRENT LAW GOVERNING INDEPENDENT COUNSEL.... 25

CONCLUSION 27

APPENDIX ..... Bound Separately

TABLE OF AUTHORITIES

Page

CASES

Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984)..... 9

Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986)..... 9

DiGirlomo v. United States, 520 F.2d 372 (8th Cir. 1975)..... 12

In re Brummitt, 608 F.2d 640 (5th Cir. 1979) 13

In re Grand July Subpoena Served Upon Niren, 784 F.2d 939 (9th Cir. 1986)..... 13

In re Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994)..... 3

In re Meese, 907 F.2d 1192 (D.C. Cir. 1990) 19

In re Paul Perlin, 589 F.2d 260 (7th Cir. 1978), *reh'g denied* and *reh'g denied en banc* (1978) 13

In re Sealed Case, 827 F.2d 776 (D.C. Cir. 1987) 13

J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 396 (1928)..... 27

Mistretta v. United States, 488 U.S. 361 (1989)..... 26

Morrison v. Olson, 487 U.S. 654 (1988)....6, 7, 8, 14, 18

U.S. v. LeBaron, 60 U.S. (19 How.) 73 (1856).....21, 24

United States v. Ryan, 402 U.S. 530 (1971).....12, 13

United States v. Tucker, 78 F.3d 1313 (8th Cir. 1996), *reh'g and reh'g denied en banc* (1996)..... 1

Wade v. United States, 504 U.S. 181 (1992) 11

TABLE OF AUTHORITIES – Continued

Page

RULES, STATUTES, CONSTITUTION

5 U.S.C. § 21(a) 22, 23
5 U.S.C. § 21(b) 23
5 U.S.C. § 706 11
5 U.S.C. § 2104(a)(1)(B) 22
5 U.S.C. § 3331 ..... 21, 22, 24
5 U.S.C. § 3332 ..... 6, 20, 21, 22, 23, 24
5 U.S.C. § 5312 ..... 14, 15
5 U.S.C. § 5507 24
18 U.S.C. § 1001 6
18 U.S.C. § 1505 6
28 U.S.C. § 591 14
28 U.S.C. § 591(b) 14, 15
28 U.S.C. § 591(c) 10, 15, 16, 18, 20
28 U.S.C. § 591(c)(1) 15
28 U.S.C. § 591(c)(2) 15
28 U.S.C. § 592 ..... 16, 18, 20
28 U.S.C. § 592(3)(f) 10, 11, 13
28 U.S.C. § 593(b) 2
28 U.S.C. § 593(c) 18, 19
28 U.S.C. § 593(c)(1) 19
28 U.S.C. § 593(c)(2) 18, 19
28 U.S.C. § 593(c)(2)(C) 19

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 594(e) 9, 11, 13, 16, 17, 18

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1826 ..... 10, 11

28 U.S.C. § 1826(a) 1, 12

Act of December 11, 1926, Pub. L. No. 69-526, 44 Stat. 918 (codified as amended at 5 U.S.C. § 3332) 22, 23

Independent Counsel Reauthorization Act of 1987 (P.L. 100-191 – "the 1987 Act") 25, 26, 27

Independent Counsel Reauthorization Act of 1994 (P.L. 103-270 – "the 1994 Act") 6, 14, 25, 26

U.S. Const., Art. I, § 1 26

U.S. Const., Art. II, § 2 6

U.S. Const., Art. III 6

OTHER

Conference Report of the 1987 Amendment 10

H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. at 22 11

Order, Div. No. 86-1 (CADC Special Division, April 23, 1986) 7

S. Rep. No. 2495, 81st Cong., 2d Sess. (1950) *reprinted in* 1950 U.S. Code Cong. & Ad. News 369, 3879-3880 23

PETITION FOR WRIT OF CERTIORARI

Herby Branscum, Jr. and Herby Branscum, Jr., P.A., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 15, 1996.

CITATION TO OPINION BELOW

The opinion in the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is reported at 78 F.3d 1307 (8th Cir. 1996). It is reprinted in Appendix A ("App. A") at page A-1. By order filed June 3, 1996, the Eighth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. B., B-1. Since the Eighth Circuit made specific reference to its decision in a challenge made by certain other individuals prosecuted by Kenneth W. Starr, that opinion is included in Appendix C at page C-1. *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996), *reh'g and reh'g denied en banc* (1996).

JURISDICTION

On September 8, 1995 a district court in the Eastern District of Arkansas issued an order pursuant to 28 U.S.C. § 1826(a) finding Herby Branscum, Jr. and Herby Branscum, Jr., P.A., in civil contempt of orders of the court issued on August 17, 1995 and August 25, 1995. Notice of Appeal of those orders was timely filed on September 8, 1995 to the Court of Appeals for the Eighth

Circuit which affirmed in an opinion filed on March 15, 1996. On June 3, 1996 the Eighth Circuit denied the timely filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Because of the volume, the statutes involved in this case are reproduced in a separately bound Appendix filed jointly with Petitioner Robert M. Hill. App. A-I.

STATEMENT OF THE CASE

On August 5, 1994, the Special Division of the Court of Appeals for the District of Columbia, issued an Order pursuant to 28 U.S.C. § 593(b) appointing Kenneth W. Starr as independent counsel. The Court granted Mr. Starr the power to investigate and prosecute:

> any individuals or entities . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

In re Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994). App. E-1.

In addition, the Court provided that:

> [t]he Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by *any person* or entity *developed during the* Independent Counsel's *investigation* referred to above *and* connected with or *arising out of that investigation*.

Id. at 2 (emphasis added). App. E-2.

On June 21, 1995, the Attorney General, acting on a request from Independent Counsel, referred prosecutorial jurisdiction to him over:

> [w]hether any person committed any crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any other persons associated with them, to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign.

App. F-3.

On June 28, 1995, the Office of Independent Counsel ("OIC") served grand jury subpoenas *duces tecum* on Herby Branscum, Jr. and Herby Branscum, Jr., P.A., a professional association through which Mr. Branscum practices law. The subpoenas sought documents evidencing contributions by Mr. Branscum, his professional association, certain relatives and the Perryville Abstract Company, Inc., to the 1990 William Jefferson Clinton

gubernatorial campaign and Mr. Clinton's 1992 presidential campaign. The subpoenas also requested documents evidencing transfers of funds from Mr. Branscum and his professional association to the same relatives and the abstract company. On July 14, 1995, motions to quash or modify the subpoenas were filed by Mr. Branscum and his professional association challenging the validity of the prosecutorial jurisdiction given to Mr. Starr and his power to act.

On July 21, 1995, OIC made Application for Order of Referral of Jurisdiction of Independent Counsel to the Special Division of the United States Court of Appeals for the District of Columbia over the matters covered in the letter from the Attorney General on June 21, 1995 which was granted one week later. App. G-1.

On August 17, 1995, the district court entered a sealed order denying the motions to quash or modify the subpoenas. App. D-1.

On August 22, 1995 the Office of Independent Counsel moved for an order compelling production of the documents called for by the subpoenas by a date certain. Mr. Branscum and his professional association then filed on August 23, 1995, a Motion for Reconsideration, Clarification, and Supplemental Motion to Quash Subpoenas, which was denied in an order filed on August 25, 1995, by the district court. App. D-12. In the same order, the Court granted the OIC's motion regarding production of the documents and ordered delivery of the documents called for by the subpoenas by August 31, 1995 to the Office of Independent Counsel as agent for the grand jury. When delivery of the documents did not occur, OIC

filed an Affidavit in Support of Application for Order to Show Cause dated September 1, 1995. The district judge issued a show cause order on September 5, 1995.

A hearing was held before the district court on September 8, 1995, and the court found Mr. Branscum and his professional association in civil contempt of the court's August 17 and August 25, 1995 orders. App. D-14. The order gave them until September 15, 1995 to purge themselves of their contempt by complying with the subpoenas *duces tecum*. The court further ordered that after September 15, 1995, contempt sanctions of $1,000 per day were imposed against Herby Branscum, Jr. and Herby Branscum, Jr., P.A., for noncompliance. The court also denied the Appellants' Motion to Stay Imposition of Contempt Sanctions.

On September 15, 1995, Herby Branscum, Jr. fully responded to the grand jury subpoena *duces tecum* by producing documents in his possession. However, Herby Branscum, Jr., P.A., continued its noncompliance with the court's order. On September 8, 1995, Notice of Appeal was timely filed appealing from the court's orders of August 17, August 24 and September 8, 1995.

On December 5, 1995 the district court ordered Herby Branscum, Jr., P.A., to pay $77,000 as contempt fines through December 1 into the registry of the court. This fine was paid and the subpoena was fully complied with on December 5.

In affirming the district court, the Eighth Circuit held that the Attorney General's decision to refer related matters to independent counsel is not subject to judicial review and that the additional referrals to independent

counsel were proper without a recusal determination. App. A-1. It further ruled that the broad grant of prosecutorial jurisdiction did not violate the Appointments Clause and Article III, that the passage of Public Law 103-270 validly reenacted the independent counsel law and that the affidavit required under 5 U.S.C. § 3332 was not a condition precedent to Mr. Starr taking office.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION UPHOLDING THE CONSTITUTIONALITY OF THE BROAD SCOPE OF PROSECUTORIAL JURISDICTION GIVEN INDEPENDENT COUNSEL IS IN DIRECT CONFLICT WITH *MORRISON V. OLSON.*

The decision below is in direct conflict with this Court's ruling in 1988 which held that the statute under which independent counsel is appointed does not violate Article III or the Appointments Clause. *Morrison v. Olson,* 487 U.S. 654 (1988). In that case, the Special Division empowered the:

> independent counsel to investigate whether the testimony of . . . Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law.

Id. at 667.

In addition, the Special Division ordered that the independent counsel:

> shall have the jurisdiction to investigate any other allegation of evidence of violation of any

> Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation. Order, Div. No. 86-1 (CADC Special Division, April 23, 1986).

Id. at 667. The Supreme Court ruled that this original grant of jurisdiction to independent counsel was broad enough to cover investigation of any persons who may have aided and abetted or conspired with Olson in connection with Olson's testimony. *Id.* at 668. Thus, the prosecutorial jurisdiction given to independent counsel at issue in *Morrison* was clearly limited to a definite subject area, i.e., Olson's testimony and the revision thereof and to a definite group of persons, i.e., Olson and those who may have aided or abetted or conspired with him concerning his testimony.

In *Morrison,* this Court stated that:

> we do not think that Congress may give the Division unlimited discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly 'incidental' to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

Id. at 679. Thus, in order to pass constitutional muster under *Morrison,* as applied to the facts of this case, the scope of Mr. Starr's jurisdiction "must be demonstrably

related to the factual circumstances" of Mr. McDougal's and Clintons' relationships with Madison Guaranty, Whitewater or Capital Management, since those are the factual circumstances which gave rise to the request for the appointment of independent counsel in this case. Mr. Branscum and his professional association had no connection in any way whatsoever related to these relationships with Madison Guaranty, Whitewater or Capital Management. Likewise, the documents sought by the grand jury subpoenas in question were not in any way factually related to Mr. McDougal's or the Clintons' relationships with Madison Guaranty, Whitewater or Capital Management. Failing that test, the extension of power to Mr. Starr to investigate any person for any federal allegation which arises out of his investigation violates the teaching of *Morrison* and thus violates Article III and the Appointments Clause of the Constitution. Therefore, Mr. Starr's jurisdiction under the August 5, 1994 Order is only valid with regard to Mr. McDougal's and the Clintons' relationships with Madison Guaranty, Whitewater or Capital Management and those persons under investigation as aiders and abettors or co-conspirators regarding those specific subject matters as authorized under *Morrison*. Accordingly, Mr. Starr had no prosecutorial jurisdiction to cause the issuance of the subpoenas in question.

II. THE CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE JUDICIAL REVIEW OF THE ATTORNEY GENERAL'S REFERRAL DECISIONS UNDER THE INDEPENDENT COUNSEL STATUTE

The circuit court held that a related matter referral under 28 U.S.C. § 594(e) by the Attorney General is not subject to judicial review. The reviewability of the Attorney General's decision to refer as a matter related to the independent counsel's prosecutorial jurisdiction under 28 U.S.C. § 594(e) had never before been addressed by any court and it is not addressed by Congress in the Act.

The court noted two cases for this position, both of which are inapposite. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) involved a suit by a member of Congress and two private citizens over the Attorney General's decision to *not* conduct a preliminary investigation of a particular allegation. The Court ruled that private citizens lacked standing to challenge that action. *Id.* at 823. Likewise, *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984), held that:

> Congress specifically intended in the Ethics in Government Act to preclude judicial review, at the behest of members of the public of the attorney General's decisions *not* to investigate or seek appointment of an independent counsel with respect to officials covered by the Act.

Id. at 1168 (emphasis added). Thus, both cases dealt with cases brought by private citizens seeking to challenge decisions of the Attorney General to *not* conduct a preliminary investigation. Neither case dealt with the situation before this Court, i.e., the reviewability of the Attorney General's decision of whether a particular

investigation is a matter related to the proper scope of prosecutorial jurisdiction granted to independent counsel by the Special Division when raised as a "just cause" defense to a finding of contempt under 28 U.S.C. § 1826.

28 U.S.C. § 592(3)(f) only provides that "[t]he Attorney General's determination under this chapter to apply to the division of the court for the *appointment* of an independent counsel shall not be reviewable in any court." (emphasis added). Of course, if the Attorney General believes that information received by her does not warrant even a preliminary investigation, § 592(3)(f) would appear to cover that decision since *ipso facto* that determination would mean that there is no need to apply for independent counsel. Similarly, if the Attorney General received information, undertook the preliminary investigation and then decided to not apply for independent counsel, the provisions of § 592(3)(f) precluding judicial review would clearly apply.

The Eighth Circuit also referred to the Conference Report of the 1987 Amendment, in support of its ruling that the determinations of the Attorney General regarding related matters jurisdiction are not subject to judicial review. However, a careful reading of the examples set forth in the Conference Report to the 1987 Amendment reveals that none were in the context of a just cause defense to a contempt and all involved decisions by the Attorney General regarding the appointment of an independent counsel which are now codified in § 592(3)(f). The examples used by the committee were (1) whether to investigate a person under § 591(c), (2) whether to exercise recusal from a case and (3) whether to require appointment of an independent counsel. Judicial review

of a § 594(e) referral decision raised as a defense in a civil contempt case was not addressed by the Committee. H.R. Conf. Rep. No. 452, 100th Con., 1st Sess. at 22.

In fact, other provisions of law specifically grants review of an agency decision and allows the reviewing court to –

> hold unlawful and set aside any agency action, findings, and conclusions found to be:
>
> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (b) contrary to constitutional right, power, privilege, or an immunity;
>
> (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . .

5 U.S.C. § 706. As discussed, the actions of the Attorney General at issue here under § 594(e) are claimed to be unconstitutional, arbitrary, not in accordance with law and in violation of statutory jurisdiction and authority and as such those actions are reviewable by a court. *Wade v. United States*, 504 U.S. 181 (1992) (holding that prosecutor's discretion is subject to constitutional limitations). To construe § 594(e) and § 592(3)(f) otherwise would quite literally leave a contemnor without any due process to challenge the prosecutorial jurisdiction of independent counsel to defend himself in a contempt proceeding by demonstrating a "just cause" defense under 28 U.S.C. § 1826 for disobedience to the Court's order.

The right of a subpoenaed party to challenge the authority of a prosecutor who initiated a grand jury subpoena has been clearly recognized where that person

has been held in contempt for failing to comply with the subpoena. In *DiGirlomo v. United States*, 520 F.2d 372 (8th Cir. 1975), the Appellant was held in contempt for refusing to obey a court order to comply with a grand jury subpoena. His defense was based on the fact that he had "just cause" under 28 U.S.C. § 1826(a) for this refusal because the special attorneys issuing the grand jury subpoenas were not properly authorized to do so. The court allowed the Appellant to raise this argument regarding the lack of authority on appeal as a defense to the contempt. The same procedural sequence and the same category of issues which were involved in *DiGirlomo* are present here.

The Supreme Court has also explicitly recognized a contemnor's ability to raise issues like the present ones after being held in contempt. As it noted:

> If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

United States v. Ryan, 402 U.S. 530, 532-33 (1971). Another Court of Appeals correctly summarized the procedure as follows:

> Thus, under the statutory structure now in place, a witness may raise in contempt proceedings before the district court defenses amounting to 'just cause' for noncompliance with the court's order. The witness may then secure appellate review of an adverse ruling.

> In the context of a subpoena *duces tecum*, we believe the teaching of *Ryan* is that the witness has 'just cause' when compliance would be 'unduly burdensome or otherwise unlawful.' *Ryan*, 402 U.S. at 532, 91 S.Ct. at 1582; *see also In re Brummitt*, 608 F.2d 640, 643 (5th Cir. 1979). In addition, it seems to us that the claim that a subpoena was applied for and issued under the signature of unauthorized persons would constitute a cognizable claim of undue burden or unlawfulness under *Ryan*. We are therefore convinced that appellant's argument satisfied the 'just cause' requirement set out in section 1826 for defenses that may be interposed in contempt proceedings and on appeal from orders of contempt.

In re Sealed Case, 827 F.2d 776, 778 (D.C. Cir. 1987). Other Circuits have likewise recognized the standing to raise these issues on appeal after a finding of contempt. *In re Grand Jury Subpoena Served Upon Niren*, 784 F.2d 939, 941 (9th Cir. 1986) ("appellate jurisdiction to review the denial of a motion to quash does not lie unless and until the witness has been held in contempt."); *In re Paul Perlin*, 589 F.2d 260 (7th Cir. 1978), *reh'g denied and reh'g denied en banc* (1978) (power of Special Attorney considered in appeal of contempt).

In addition to raising serious due process questions, a construction of 28 U.S.C. § 594(e) and § 592(3)(f) which precludes any judicial review of a related matter referral by the Attorney General would totally emasculate other provisions of the Act. If this were the law, all that would be needed is a nonreviewable decision by the Attorney General to refer investigation of anybody for anything to independent counsel regardless of whether the original

grant of prosecutorial jurisdiction was constitutional, regardless of whether the matter referred was "demonstrably related" under *Morrison* to the proper prosecutorial jurisdiction of independent counsel, and regardless of whether the other provisions of the Act were complied with.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE PREREQUISITES IMPOSED ON THE ATTORNEY GENERAL UNDER THE INDEPENDENT COUNSEL STATUTE PRIOR TO REFERRING A NON-COVERED PERSON TO INDEPENDENT COUNSEL

At the outset of this discussion, it must be noted that the Independent Counsel Reauthorization Act of 1994 ("the 1994 Act") 28 U.S.C. § 591, *et seq.*, (App. I-9) clearly delineates certain individuals who are covered by the statute. Included within the coverage are the President, Vice-President, certain high ranking individuals in the office of the President, high ranking Assistant Attorney Generals, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the IRS, the Chairman and Treasurer of the principal national campaign committee for the election and re-election of the President and any officer of that committee excising authority at the national level during the incumbency of the President, Cabinet members and other individuals serving in positions listed in 5 U.S.C. § 5312.[1] 28 U.S.C.

---

[1] The individuals covered by this statute are the Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney

§ 591(b). Clearly, Mr. Branscum and his professional association are non-covered persons since neither is automatically covered by the specific terms of the Act. 28 U.S.C. § 591(b), 5 U.S.C. § 5312. Accordingly, the only possible way by which Mr. Branscum or his professional association can be investigated by independent counsel is the procedure provided for in 28 U.S.C. § 591(c).

Under these provisions, in order to empower an investigation by an independent counsel of a person not listed in § 591(b) two requirements must be met. First, the Attorney General must receive "information sufficient to constitute grounds to investigate" whether a non-covered person may have violated any federal criminal law other than a violation of a Class B or C misdemeanor or an infraction. 28 U.S.C. § 591(c)(1). Second, the Attorney General must determine that the investigation or prosecution of that person with regard to the information received by the Attorney General or other officer of the Department of Justice could "result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c)(2). There was no such determination by the Attorney General that an investigation or prosecution of Herby Branscum, Jr. or his professional association "may result in a personal, financial or political conflict of interest" for her. Accordingly, the requirement of 28 U.S.C. § 591(c)(2)

General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Special Representative for Trade Negotiations, Secretary of Energy, Secretary of Education. 5 U.S.C. § 5312.

clearly was not met. Without that determination the independent counsel mechanism cannot be triggered to investigate those who are otherwise non-covered persons under the Act.

Even if one assumed that both of the above requirements of § 591(c) had been satisfied, there is another clear statutory problem with the attempted invocation of the Act with regard to Mr. Branscum and his professional association. Section 591(c) requires that the Attorney General conduct a "preliminary investigation in accordance with § 592" if the two (2) requirements of § 591(c) noted above are satisfied in order to then determine if a referral to independent counsel is warranted under § 594(e). Since Herby Branscum, Jr. and his professional association are non-covered persons under the Act, the requirement of a preliminary investigation under § 591(c) by the Attorney General prior to any referral to independent counsel under 28 U.S.C. § 594(e) is mandatory. In other words, the provisions of § 594(e) must be read in conjunction with § 591(c) and § 592.

Subsequent to the Special Division's initial grant of authority on August 5, 1994, the Attorney General's office issued a letter dated September 2, 1994 to independent counsel referring matters as related to the prosecutorial jurisdiction granted independent counsel on August 5, 1995. App. F-1. The September 2, 1994, letter referenced above was issued by the Acting Assistant Attorney General of the Department of Justice and stated that jurisdiction over "[w]hether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank" was referred to OIC as a related matter under 28

U.S.C. § 594(e). App. F-1.[2] Then on June 21, 1995, a letter from the Assistant Attorney General of the Department of Justice to OIC stated that "[a]fter reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that this matter is related to one of the matters referred to you by the Department of Justice on September 2, 1994 and that referral to your office would be appropriate." App. F-3. The letter went on to refer under § 594(e) "[w]hether any person committed any federal crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any other persons associated with them, to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign." App. F-3.[3]

---

[2] On December 19, 1994, the Special Division acting on an Application for Order of Referral and Order of Jurisdiction of Independent Counsel granted related matter jurisdiction to Mr. Starr pursuant to 28 U.S.C. § 594(e) to determine "[w]hether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank." App. H-1.

[3] On July 28, 1995, the Special Division acting on an Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed on July 21, 1995 granted related matter jurisdiction to Mr. Starr under § 594(e) to determine "[w]hether any person committed any federal crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any persons associated with them, to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign and "[w]hether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank." (App. G-1). Since this order came over one month after the subpoenas at

It is respectfully submitted that these attempted referrals of related matter jurisdiction is not, in fact, related to the constitutionally proper scope of independent counsel's jurisdiction as defined in the Order of August 5, 1994 but a naked attempt to expand Mr. Starr's jurisdiction to other areas without compliance with the requirements of § 591(c) and § 592 discussed above and without complying with § 593(c)(2).

In *Morrison*, the Supreme Court stated that "[i]n our view, this provision (§ 594(e)) does not empower the court to expand the original scope of the counsel's jurisdiction, that may only be done upon request of the Attorney General pursuant to § 593(c)(2). At most, § 594(e) authorizes the court simply to refer matters that are 'relate[d] to the independent counsel's prosecutorial jurisdiction' as already defined." *Morrison* at 680. Since the "already defined" jurisdiction of Mr. Starr in the August 5, 1994 order was only constitutionally proper as to Mr. McDougal's and the Clintons' relationships to Madison Guaranty, Whitewater and Capital discussed above, the attempt to include jurisdiction over the 1990 Clinton gubernatorial campaign accounts at the Perry County Bank and the political campaign contributions by Mr. Branscum in 1990 and 1992 are *not* "related matters," but rather is an attempt to expand the original scope of independent counsel's jurisdiction in violation of *Morrison* and § 593(c).

---

issue were served, it, of course, cannot serve as any authority for OIC to issue the subpoenas.

Section 593(c) sets forth the proper method of expanding the jurisdiction of independent counsel. If independent counsel receives information about potential criminal law violations not covered by the original prosecutorial jurisdiction, the information must first be submitted to the Attorney General. 28 U.S.C. § 593(c)(2). The Attorney General then must conduct a preliminary investigation of the information as provided in § 593(c)(1). Only if "the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted" shall she request that the Special Division expand the jurisdiction of independent counsel. 28 U.S.C. § 593(c)(2)(C). The preliminary investigation and reasonable grounds finding by the Attorney General are mandatory. *In re Meese*, 907 F.2d 1192, 1197 (D.C. Cir. 1990). As the *Meese* Court held, "[a]s we interpret the statute, there must be a determination by the Attorney General that the 'reasonable grounds' requirement is satisfied before a valid investigation of an added official can be referred to an existing independent counsel." *Id.* at 1197. It is clear from the referral letters above that these requirements of § 593(c) were not complied with. Because of these reasons, the attempted referrals by the Attorney General on September 2, 1994 and on June 21, 1995 and the Order of December 19, 1994 are invalid and the issuance of the subpoena in question was beyond the proper prosecutorial jurisdiction of independent counsel.

Clearly also, from the letters of September 21, 1994 and June 21, 1995 the Attorney General did not make the recusal determination as required and did not conduct an independent preliminary investigation, but instead simply reviewed information presented to it by OIC. It is

respectfully submitted that this review does not comport with the clear requirements of the preliminary investigation which is required under § 591(c) and § 592. As the *Meese* court noted:

> Rather, the addition of Edwin Meese III as a new targeted subject of an existing independent counsel investigation began as a result of a *referral* by letter to Independent Counsel McKay who was already investigating Nofziger's role in Wedtech. That *investigative* jurisdiction over an additional targeted *individual subject* was being requested and obtained *by referral*, however, did not eliminate the necessity for compliance with the requirement of Sec. 592(c)(1) that there be a preliminary investigation and finding of reasonable grounds to believe that further investigation or prosecution of the targeted official, as a subject of the investigation, was warranted.

Id. at 1197.

IV. THIS CASE PRESENTS AN IMPORTANT CASE OF FIRST IMPRESSION AS TO WHETHER THE STATUTORY REQUIREMENT THAT A SWORN AFFIDAVIT BE FILED STATING THAT THE APPOINTMENT HAS NOT BEEN PURCHASED IS A CONDITION PRECEDENT TO BECOMING EMPOWERED WITH THE POSITION

Kenneth W. Starr did not comply with the explicit provisions of 5 U.S.C. § 3332 until on or after August 29, 1995 when Mr. Starr executed the required affidavit and filed it with the Special Division. The Circuit Court ruled that Mr. Starr's appointment was effective on August 9,

1994 when only the general oath required by 5 U.S.C. § 3331 was administered to him by the Special Division. This construction of 5 U.S.C. § 3332 is contrary to (1) United States Supreme Court's explicit recognition of the power of Congress to impose conditions precedent upon an appointee before investiture of the office is accomplished, *U.S. v. LeBaron*, 60 U.S. (19 How.) 73 (1856), (2) the clear and mandatory requirements of the statute, and (3) legislative history regarding this provision.

In 1856, the Supreme Court in *LeBaron* addressed the issue of when a person becomes invested with an office. The narrow issue in that case was whether or not a bond which was required to be filed before a postmaster entered an office could have the effect of relating back to the date of appointment rather than from the time of its acceptance by the Postmaster General. The Supreme Court decided that issue by holding that the bond is valid only "from the time when it reached the Postmaster General, and was accepted by him." *Id.* at 77. However, in addition, the Supreme Court noted that:

> when a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to the office is complete. *Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office;* but they are to be performed by the appointee, not by the executive; all the executive can do to invest the person with his office has

> been completed when the commission has been signed and sealed; and *when the person has performed the required conditions, his title to enter on the possession of the office is also complete.*

Id. at 78 (emphasis added). Thus, under *LeBaron* it is clear that Congress can require that "conditions precedent to the complete investiture" be imposed on an appointee.

5 U.S.C. § 3331 states that "an individual, except the President, elected or appointed to an office of honor or profit in the civil service or the uniformed services, shall take the following oath . . . " However, § 3331 also provides that "this section does not affect other oaths required by law." 5 U.S.C. § 3332[4] provides that:

> an officer, within 30 days after the effective date of his appointment, *shall file with the oath of office required by § 3331* of this title, an affidavit that neither he nor anyone acting in his behalf has given, transferred, promised, or paid any consideration for or in the expectation or hope of receiving assistance in securing the appointment (emphasis added).

Under the express terms of 5 U.S.C. § 2104(a)(1)(B) this section clearly applies to Kenneth W. Starr, a fact acknowledged by him when he filed the special oath required by § 3332 over 385 days after his appointment. Thus, the special oath required of § 3332 is another oath "required by law" noted in § 3331 and it applies to Mr. Starr.

---

[4] This provision was previously located in 5 U.S.C. § 21(a) and was made a requirement of public office by the Act of December 11, 1926, Pub. L. No. 69-526, 44 Stat. 918 (codified as amended at 5 U.S.C. § 3332).

Furthermore, examination of the congressional history of the language of this statute clearly shows that Congress intended the affidavit required under § 3332 to be a special oath required of individuals appointed to public office. In discussing this section, a Senate report noted the following:

> The purpose of this section is to change the requirements for filing of the special oath required of persons appointed to public office.
>
> Under present law, Act of December 11, 1926, 44 Stat. 918, as amended, 5 U.S.C. § 21(a) each person appointed as a civil officer of the United States by the President, by and with the advice and consent of the Senate, or by the President alone, or by a court of law, or by the head of a department, is required to file with the Comptroller General an affidavit to the effect that no consideration was paid for his appointment. The Act prohibits payment of salary to any person until such oath has been filed." 5 U.S.C. § 21(b).
>
> * * *
>
> This section would permit the special oath required of appointive officers mentioned above to be retained in the agency files where it would be available for use in the audit of payrolls in the same manner as is the general oath required of all officers. This would obviate the necessity for having different types of oaths for the same officer filed in different places and would permit the use of a form on which both oaths could be combined in cases where both are required of one person.

S. Rep. No. 2495, 81st Cong., 2d Sess. (1950) *reprinted in* 1950 U.S. Code Cong. & Ad. News 369, 3879-3880.

The law is clear that until the special oath under § 3332 has been filed with the general oath required by § 3331, the appointee may not be paid. 5 U.S.C. § 5507 states that "[a]n officer required by § 3332 of this title to file an affidavit may not be paid until the affidavit has been filed." This provision reflects explicit recognition that until the special oath of § 3332 has been executed and filed, the appointee has not been invested with the office and, of course, cannot therefore be paid.

It is thus clear by this legislative history that the intent of Congress was to require persons appointed to public office to execute *both* the general oath presently contained in § 3331 and the special oath presently contained in § 3332 as "conditions precedent" to being invested with the power of the office as specifically recognized by the Supreme Court in *LeBaron*. Further evidence that these oaths are "conditions precedent" is the unequivocal requirement that a person appointed to public office may not be paid until the special oath in § 3332 has been filed with the oath of § 3331. 5 U.S.C. § 5507. This requirement is logical since a person is not empowered with the appointed office until the special oath of § 3332 has been taken and he should not be entitled to payment until that time.

In summary, it is clear that the only oath administered to Mr. Starr on August 9, 1994 by the Special Division was the general oath required under § 3331. The required special oath under § 3332 was not taken until 385 days later. Since both oaths are conditions precedent to Mr. Starr's investiture as Independent counsel, he did not have the power and authority to cause the subpoenas in question to be issued and they are thus void.

V. THIS CASE RAISES AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE VALIDITY OF THE CURRENT LAW GOVERNING INDEPENDENT COUNSEL

The Independent Counsel Reauthorization Act of 1994 (P.L. 103-270 – "the 1994 Act") did not operate to validly reenact the provisions of the Independent Counsel Reauthorization Act of 1987 (P.L. 100-191 – "the 1987 Act") which expired on December 15, 1992 except as to then ongoing actions.

Section 599 of the 1987 Act provided as follows:

> This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1987, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determine such matters have been completed.

P.L. 100-191 (December 15, 1987). App. I-1. Thus, on December 15, 1992 the Independent Counsel law expired by its very own sunset terms except as to independent counsel actions in effect at that time. In an effort to revive the law, Congress only amended the effective dates of the 1987 Act as opposed to reenacting the entire statute. App. I-45. Thus, the issue before the Court is whether Congress can validly revive a statute which has unquestionably expired merely by amendment of the expired statute's effective date. It should be observed that since its passage in 1978, the provisions governing independent counsel had never been allowed to expire until 1992. In 1987, even

though the previous statute had not expired, the entire statute was reenacted. It is respectfully submitted that because of the express language of the 1987 Act, the statute died on December 15, 1992 as to any new Independent Counsel appointments and was not validly renewed by P.L. 103-270. Accordingly, all of the actions of Mr. Starr taken as independent counsel are void.

In addition, the provisions of the 1987 Act which Congress sought to reenact are invalid because of violation of separation of powers and Article I of the Constitution since it impermissibly attempts to assign a clear legislative function, i.e., the time period during which a statute is valid without any guidance from it, to the Executive branch. As noted above, the 1987 Act stated that:

> this chapter shall continue in effect with respect to then pending matters before an Independent Counsel that in the judgment of such counsel require such continuation until that Independent Counsel determines such matters have been completed.

P.L. 100-191 (December 15, 1987). App. I-44. The Constitution provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. App. I-1. From this language, the nondelegation doctrine has originated: that Congress may not constitutionally delegate its legislative power to another branch of government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Supreme Court has set the delegation standard clearly:

> So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' (*citing J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 396, 409 (1928).

Id. at 372. However, the quoted language above in the 1987 Act assigns a purely legislative function without providing any legislative guidance to the Executive branch since it is purely discretionary with independent counsel as to how long the provisions of the 1987 Act should be continued. As such, those provisions clearly violate Article I and the separation of powers doctrine and are invalid. Thus, the substantive provisions of the 1987 Act which Congress sought to revive in the current law governing independent counsel are invalid and all actions taken by Mr. Starr are invalid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAN GUTHRIE
1845 Woodall Rodgers Freeway
Suite 1000
Dallas, TX 75201
(214) 953-1000

Attorney for Petitioners
Herby Branscum, Jr. and
Herby Branscum, Jr., P.A.